UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

LETASHA MYATT, on behalf of herself others similarly situated, Plaintiff, v. ALLEN COUNTY SHERIFF KEN FRIES (in his official capacity), Defendant.	)	CASE NO.: 1:10-CV-64-TLS

PLAINTIFF'S BRIEF IN SUPPORT OF TRIAL RULE 60 MOTION FOR RELIEF OF "SEPARATE JUDGMENTS" AND OTHER MATTERS

LeTasha Myatt filed this case as a class action and proceeded on her own behalf and for those similarly-situated (pretrial detainees who were arrested without a warrant and who did not timely receive a judicial determination of probable cause). There were 962 class members. The jury verdict was rendered on January 20, 2015. Judgments were entered on the verdict on November 5, 2015. Plaintiff contends that a Trial Rule 60 order vacating the individual judgments in favor of a collective class action judgment is appropriate. Further, Plaintiff contends that from that class action judgment each individual class member should be paid his/her computable compensatory damages (determinable from the jury verdict), and from the unclaimed funds there should be paid to the class representative an incentive award of $10,000.00 and then allow a *cy pres* distribution of the unclaimed funds.

I. Trial Rule 60 Motion for Relief of Judgment

"The district court has great latitude in making a Rule 60(b) decision because that decision is discretion piled on discretion." *Bakery Machinery & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848 (7th Cir. 2009), quoted in *Banks v. Chicago Board of Education*, 750 F.3d

663, 667 (7th Cir. 2014). A district court may grant Rule 60(b) relief in a variety of circumstances, including 1) mistake, inadvertence, surprise, or excusable neglect; 4) a district court may relieve a party from final judgment if the judgment is void for lack of personal jurisdiction over that party (*Philos Technologies, Inc. v. Philos & D, Inc.*, 645 F.3d 851, 854 (7th Cir. 2011); and 6) any other reason that justifies relief. Fed.R.Civ.P. 60(b).

Pursuant to Rule 60(b)(4), the parties/court lacked the ability to enter judgments *individually* in favor of *individual* class members because the proper party in this case was always LeTasha Myatt, on behalf of herself and other similarly-situated. Stated differently, the individual class members were never individual plaintiffs/parties in this cause. Judgment should have been entered in favor of the class representative, and the common fund damages distributed pursuant to a distribution plan.

Plaintiff recognizes that the catch-all provision of Rule 60(b)(6) is meant to provide relief as an "extraordinary remedy" and should be granted only in "exceptional circumstances". *Bakery Machinery,* 570 F.3d at 848. The circumstances in this case (a class action which went to trial generating a common fund and the necessity of a distribution plan, including dealing with residual/ unclaimed funds), are extraordinary. Furthermore, as will be explained later, it defeats the purpose of a class action to have 962 separate judgments pursued by 962 separate class members, when the whole purpose of Rule 23 was to provide efficiency and economy to the judicial process, presumably including enforcing the class action judgment.

Reforming the judgment is appropriate because this is, and always was, a *class action* under Rule 23. The Class Representative is the one who owned and who was responsible for enforcing the judgment. By entering 962 separate judgments, the case was essentially converted from a class case to 962 individual actions – something that was never envisioned by Rule 23 and a result which was inadvertently allowed by the parties and the Court in this case. By allowing 962 separate judgments to go forward, and given the loss of the character of this action as a "class action" by allowing the maintenance of separate judgments, both the parties and the Court have lost, to a certain degree, the enforceability of this action as a class action, as well as impaired the ability to make a fluid and "certain" distribution of the damages. Further, by allowing 962 judgments to go forward, the parties and the Court have almost guaranteed that this case, insofar as seeking out the class members and enforcing the individual class member judgments, will last at least 20 years or more, something never envisioned by Rule 23. Accordingly, Plaintiff requests that the Court grant Plaintiff's Rule 60 Motion based upon mistake of fact and law, lack of personal jurisdiction, and inadvertence, as well as excusable neglect. After all, although based on 962 calculations, the jury verdict resulted in a common fund and a judgment enforceable only by the Class Representative, not individual class members. The resulting separate individualized judgments were the result of legal error and were not in keeping with Rule 23 of the Federal Rules of Civil Procedure.

Noteworthy is that when there is a special verdict regarding damages, and where the verdict does not determine an aggregate compensatory award to the class as a whole, it is not "final" as contemplated in F.R.C.P. 54, 58, or 23, although under Rule 58 and 23(c)(3), a judgment entered is conclusive as to the factual matters decided. See *Allapattah Services, Inc. v. Exxon Corp.*, 157 F.Supp.2d 1291, 1303-04 (S.D. Fla. 2001). No final judgment can be entered until after individual class members have made claims and both the validity and the amount of the claims have been determined. *Id.*

II. Distribution of Unclaimed Funds

"When unclaimed funds remain after individual distributions to identifiable class members, courts choose from among four 'second best' methods of distributing the remainder: a) *pro rata* distribution to the class; b) reversion to the defendant; c) escheat to the government; or d) *cy pres* distribution. *Cy pres* distribution ordinarily emerges as the preferred method, as courts disfavor either class members, defendant or the government receiving a wind fall." *McLaughlin on Class Actions: Law and Practice,* 11th Ed. Vol. 2 § 8: 15, pp. 456-57 (Thompson Reuters/West 2014).

Given that the purpose of this class action was to compensate individuals who lost their liberty because of the Sheriff's unconstitutional custom and practice of over-detaining pretrial detainees who were arrested without a warrant, it makes sense that the Court would allow *pro rata* distribution to the class. However, if the Court chooses *cy pres* distribution, because the intended recipient is no longer available (or is unable to claim his/her share of the fund), courts in class actions use the theory to distribute unclaimed funds "for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly-situated." *McLaughlin*, Vol. 2 § 8:15 p. 457; *in re Airline Ticket Com'n. Antitrust Litigation*, 307 F.3d 679, 682-83 (8th Cir. 2002). The fluid recovery is typically implemented as follows:

> 1) The amount of damages incurred by the class as whole is determined in a single adjudication, creating a damage fund;
>
> 2) Individual member claimants capable of proving valid claims obtained their share of the fund; and
>
> 3) The unclaimed portion of the fund is applied to the class' benefit…usually in the form of a reduced charge for an item the defendant previously overpriced, or it is given to the state to use on a project likely to be of interest to class members or, if that is not possible, for general purposes.

Id. at § 8:15, p. 458, quoting *Cicelski v. Sears Roebuck & Co.*, 132 Mich. App. 298, 300-305, 348 N.W.2d 685, 689 (1984) (citation omitted).

When unclaimed funds for a class remain after notice has been provided to class members and the claims process is concluded, courts typically implement the *cy pres* distribution in their discretion "either through a market system…, or through project funding the project being designed to benefit the members of the class." *McLaughlin*, § 8:15, p. 459; *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997).

"When it is not transactionably feasible to distribute settlement funds directly to individual class members, either because it is either: a) too difficult to identify them; b) the cost of distribution would so erode the funds as to eviscerate the settlement consideration; or c) class members or unlikely to come forward to collect a *de minimis* recovery, courts have authorized the distribution of settlement proceeds for one or more uses that indirectly benefit class members. In this manner, the deterrent and compensatory policies of substantive laws are advanced in circumstances where recovery would otherwise be impracticable." *McLaughlin*, § 8:15, p. 460; *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 675 (7th Cir. 2013). Accordingly, if there are unclaimed funds after the attempted distribution to individual class members, Plaintiff argues that these funds (after payment of an incentive award to the class representative) should go to either Legal Aid of Allen County, the Indiana Civil Liberties Union, or some other like entity which serves to advance the interests of civil rights/constitutional law.

III. Incentive Award to LeTasha Myatt as Class Representative

There is near-universal recognition that it is appropriate for courts to approve an incentive award payable from the class recovery, usually within the range of $1,000 - $20,000.00. *McLaughlin*, § 6:28, p. 187; *in re Synthroid Marketing Litigation*, 264 F.3d 712, 722 (7th Cir. 2001) ("Incentive awards are justified when necessary to induce individuals to become named representatives.") The amount that is reasonable to award ordinarily is driven by an assessment in the court's discretion of the time and effort invested by the class representative in the litigation. *McLaughlin*, § 6:28, pp. 187-189. See *Matter of Continental Illinois Securities*

Litigation, 962 F.2d 566, 571 (7th Cir. 1992), as amended on denial of reh'g (May 22, 1992); see *Manual for Complex Litigation* (4th), § 21.62 n. 971 ("compensation for class representatives may sometime be merited for time spent meeting with class members, monitoring cases, or responding to discovery.") In this case, LeTasha Myatt was extremely involved in the litigation: she brought the claim; she interviewed with counsel; she was deposed; she helped answer discovery; and she appeared and participated at the first day of trial; even though she wasn't a "special damages claimant", she attended the Special Master proceedings; she has kept up on the proceedings and has frequently and regularly communicated with counsel both in person and by telephone. LeTasha Myatt requests an incentive award in the amount of $10,000.00.

What distinguishes this case from other over-detention class action cases is that this case was tried as opposed to being settled. The subject matter of the Class Representative's entitlement to an incentive award has been discussed at virtually every telephonic status conference with the court and counsel. Plaintiff maintains that the Court may exercise its equitable powers to award Myatt an incentive for her active participation throughout this class action litigation. Plaintiff requests that the Court either make this award as a "cost", or alternatively, permit the Class Representative to collect the incentive award from a portion of the unclaimed funds which exist after attempts to distribute funds to class members. It would be odd, indeed, that class members whose cases settled prior to trial receive an award, but a class representative who works harder because the class action went to trial would not receive an award.

IV. Conclusion

Plaintiff-Class Representative LeTasha Myatt, on behalf of herself and others similarly situated, prays that the Court grant her relief under Rule 60 of the Federal Rules of Civil

Procedure and that the judgment in this case be reformed so that there is one class-wide judgment as opposed to 962 individual judgments, that any residual unclaimed funds after distribution to class members be distributed via *cy pres* fluid recovery, that LeTasha Myatt receive an incentive award of $10,000.00, and for all other just and proper relief in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby swears and affirms that a true and correct copy of the above was deposited in the United States Mail, sent via ECF, or by some other method approved by this Court, on this 30th day of June, 2016, to the following:

John O. Feighner
J. Spencer Feighner
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/s/Christopher C. Myers

CCM/js